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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 835

MUELLER CO., *Petitioner*

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Mueller Co., prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Seventh Circuit entered on November 15, 1963, which affirmed and enforced an order of the Federal Trade Commission issued against petitioner on January 12, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 323 F. 2d 44 (7th Cir. 1963) and constitutes Appendix A hereto. The opinion of the Federal Trade Commission has not yet been officially printed but is reported at CCH Trade Reg. Transfer Binder, 1961-1963, ¶ 15,686 (1962). It constitutes Appendix B hereto. The Initial Decision by the Commission's

Hearing Examiner, not reported, constitutes Appendix C hereto.

JURISDICTION

The decree of the Court of Appeals entered November 19, 1963, constitutes Appendix A-1 hereto. The Court of Appeals order denying petitioner's petition for rehearing and amending the Court's original opinion was entered October 21, 1963 and constitutes Appendix A-2 hereto. The jurisdiction of this Court is invoked under 15 U.S.C. § 45(c) (1958), 28 U.S.C. § 1254(1) (1958), and 5 U.S.C. § 1009(e) (1958).

QUESTIONS PRESENTED

1. Does Section 2(a) of the Robinson-Patman Act prohibit different compensatory discounts to competing distributors who perform different functional services of unequal cost or value?

2. Is "compensation . . . for any services or facilities furnished by or through [customers]" to be tested under Section 2(d) which contains the language specifically addressed thereto by the Congress, or under the different criteria of Section 2(a)?

3. If compensatory discounts for services of unequal cost or value are subject to Section 2(a), what are the criteria of legality?

4. Has the Commission, with the assent of a majority of the Court of Appeals, prosecuted under Section 2(a) of the Robinson-Patman Act and convicted under Section 2(d), thereby depriving petitioner of its constitutional and statutory right to be properly apprised of the charge against it?

5. Is there substantial evidence in the record to support the peremptory overturning of the Hearing Examiner's findings:

(a) That "The increased discount of 10 percent is no greater than is necessary to reimburse respondent's limit jobbers for the function they perform";

(b) That there was "a failure of proof as to competitive injury, either actual or potential";

(c) That "No arbitrary limitation is maintained by respondent on the number of limit jobbers."

6. Is the order to cease and desist arbitrary, unduly broad, ambiguous and contrary to the standards set forth by this Court for Robinson-Patman Act orders?

THE STATUTES INVOLVED

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), provides in pertinent part as follows:

> Sec. 2(a) That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958), provides as follows:

> Sec. 2(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

The United States Constitution provides in pertinent part (Amendment V) that:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

Section 5(a) of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(a) (1958), provides in pertinent part:

> (a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted.

STATEMENT OF THE CASE

Petitioner Mueller Co. manufactures and sells valves, fittings and equipment for use as components of water distribution systems. The end users of these products are municipal water utilities which are publicly or privately owned.

Waterworks products account for about 60% of petitioner's business. Sales of waterworks products are divided about equally between sales directly to end users and sales through jobbers. The pricing evidence in the present case relates solely to sales of waterworks products through jobbers.

Field stocks of petitioner's waterworks products are essential for emergency repairs of water distribution facilities. After long maintaining its own field warehouses to serve the municipal water systems, petitioner effectuated field stocking at a lower cost through use of the existing facilities of independent warehousemen, wholesalers and jobbers located in various areas throughout the country. (App. C, pp. 17a, 30a)

Closing its own warehouses, petitioner commenced selling to such independent stocking jobbers (designated "limit jobbers") on the following basis: (a) 25% compensatory discount where the jobber took possession of the goods and delivered them to the end user; (b) 15% compensatory discount where the jobber ordered the goods for delivery by petitioner (accomplished by drop shipment directly to the end user). The 10 percent differential between (a) and (b) was an incentive to compensate the jobber for the extra costs involved in possession, handling and delivery. (App. C, pp. 30a-33a)

From time to time petitioner also received orders from other jobbers who had not elected to invest in an inventory

of petitioner's waterworks products. These were called "regular jobbers". Such orders were small and for drop shipment delivery by petitioner to end users. The 15% drop shipment discount was accorded, the same discount which was applicable to the stocking jobbers when they ordered for drop shipment. The sales to non-stocking jobbers were made by petitioner as a convenience to the jobbers and to the communities which they served. They accounted for less than 2% of petitioner's sales. (App. C, p. 33a)

The Federal Trade Commission, on June 10, 1959, issued its complaint charging that petitioner violated Section 2(a) of the Clayton Act, as amended (15 U.S.C. § 13(a)) by selling its products to "limit jobbers" at 25% off list prices and to "regular jobbers" at 15% off list prices. (JA 3)[1] Petitioner's answer denied discrimination and alleged that its discounts were based upon the character of the service performed; that on drop shipments to end users, all jobbers received the same discount; that the extra discount was accorded on transactions in which jobbers performed additional functions in petitioner's distribution system. (JA 10)

Following hearings, the Commission's Hearing Examiner dismissed the complaint on the grounds that the 10% differential was functional, limited to goods on which the function was performed, no greater than necessary, available on reasonable terms, and caused "no substantial competitive injury, nor any reasonable probability thereof, to respondent's regular jobbers". (App. C, pp. 32a, 33a)

The Federal Trade Commission, on January 12, 1962, vacated the Hearing Examiner's decision and made findings and conclusions diametrically opposed to those made by

[1] The abbreviations "JA" refer to the Joint Appendix filed by the parties in the court below.

its Hearing Examiner, for the most part without citations to the record. The Commission repudiated *Doubleday & Co.*, 52 F.T.C. 169, 209 (1955), which had permitted functional service compensation under Section 2(a). As to the showing in the record of reasonable relationship to buyers' costs (the Commission's standard of cost justification under Section 2(d)) the Commission, without specifically setting aside the examiner's finding, concluded that such showing was not material. (App. B, p. 25a) It also said that the stocking discount was not proportionally available to regular jobbers and that on certain shipments to stocking jobber warehouses, designated "tagged" shipments, the function had not been performed because the jobbers may have received orders for such products prior to ordering from petitioner for shipment to their warehouses.

The Commission ordered petitioner, in the sale of its water *and* gas products, to cease and desist from:

> Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser competing in fact with such unfavored purchaser in the resale and distribution of such products. (App. B, p. 19a)

On appeal, the Commission's order was affirmed by the United States Court of Appeals for the Seventh Circuit, one judge dissenting. The majority stated:

> Because we think the Commission's finding is based on substantial evidence, it follows that it was warranted in concluding that § 2(a) was violated by price discrimination in that the "functional discount" was not available to all other jobbers or customers of petitioner as required by § 2(d). (App. A, p. 4a)

Judge Swygert dissented. First, he did not believe that the record evidence supported the Commission's reversal of

its examiner. Secondly, he was of the opinion that the Commission erred in overturning the doctrine of its 1955 *Doubleday* decision. As a third distinct ground, Judge Swygert objected to the Commission's substitution by hypothesis of a 2(d) charge and conviction for the 2(a) charge in the complaint. He stated:

> The General Counsel argues that the Commission recognized that the "limit" jobbers perform warehousing and stocking services which the "regular" jobbers do not perform. It is said for the Commission, however, that if Mueller is to compensate the limit jobbers for these services, it "must follow the terms and conditions specified in Section 2(d)." [footnote omitted]
>
> The answer to this argument is that a violation of Section 2(d) is not charged. The Commission apparently recognized from the start that this is not a true Section 2(d) situation and that arguably there may be justification for a difference in discounts between the limit and the regular jobbers. *Its election to prosecute a Section 2(a) charge precludes the maintenance of a Section 2(d) charge and conviction which the Commission and its counsel have added (or substituted) by way of hypothesis.* (App. A, p. 10a) (Italics supplied)

After the opinion was handed down, petitioner sought rehearing. Petitioner pointed out that Sections 2(a) and 2(d) of the Robinson-Patman Act are directed at two different types of practices: 2(a) is specifically addressed to discrimination in *price;* 2(d) specifically regulates *compensation of customers for services.* The criteria of legality under 2(a) are substantially different from the criteria of legality under 2(d); prior to the decision in the case at bar, neither the Commission nor any court had ever before required a technical 2(a) cost justification of any functional discount or service payment; and a long line of 2(d) precedents permitted different rates of compensation for services of unequal cost or value. Petitioner also argued

that the action of the Commission and of the majority in finding a 2(a) violation on a 2(d) ground had deprived petitioner of its constitutional right to be apprised of the charge and to defend.

In its "Answer to Petition for Rehearing", p. 4, counsel for the Commission disassociated the Commission from the majority opinion of the Court of Appeals. The Commission's General Counsel stated:

> . . . the Commission did not reach the question of whether compliance with Section 2(d) would be a defense to a charge of violation of Section 2(a) . . . .

In denying the petition for rehearing, the majority modified its opinion. (App. A-2, p. 14a)

REASONS FOR GRANTING WRIT

This petition raises in this Court, for the first time since the Robinson-Patman Act was enacted in 1936, key questions of the permissibility and scope of functional discounts to compensate for services performed by customers.

Section 2(d) of the Robinson-Patman Act has never been construed by this Court, nor has any Court ever ruled on the relationship between Section 2(a) and Section 2(d).

Never before has the Commission applied Section 2(a) so as to interfere with a compensatory discount differential between shipments delivered to the end user by the distributor and shipments delivered to the end user by the manufacturer. The decision has no supporting Federal Trade Commission or Court precedent under Section 2(a) or Section 2(d) of the Robinson-Patman Act.

The decision herein arbitrarily creates a new and wholly unworkable precedent under Section 2(a). It also places in

jeopardy long-standing distribution practices of thousands of manufacturers and their distributor customers who rely upon a long history of precedents under Section 2(d) holding that it is permissible to compensate competing distributors at different rates of compensation for the performance of different functional services which are of unequal cost or value.[2]

The decision adversely affects not only petitioner and its 40 competitors but also almost all manufacturers who are not vertically integrated and who use the services of independent middlemen in channels of distribution.

The case is of even greater importance and of greater potential damage to the many thousands of independent middlemen—wholesalers, jobbers and distributors—whose livelihood depends on the performance of valuable services in channels of distribution for reasonable compensation.

The majority of the Court of Appeals affirmed the Commission's decision and order but did so out of confusion and misunderstanding. The opinion of the majority of the Court of Appeals establishes a fundamental conflict with the Commission as to what should or will constitute future compliance with Section 2(a), with Section 2(d) and with the Commission's order.

The Commission's decision herein repudiates its 1955 holding under Section 2(a) in the *Doubleday* case which

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[2] *Lever Bros. Co.*, 50 F.T.C. 494, 512 (1953); *Procter & Gamble Distributing Co.*, 50 F.T.C. 513 (1953); *Colgate-Palmolive-Peet Co.*, 50 F.T.C. 525 (1953); *Doubleday & Co.*, 52 F.T.C. 169, 209 (1955); *General Foods Corp.*, 52 F.T.C. 798, 813-814 (1956); *Giant Food, Inc.*; F.T.C. Dkt. 6459, CCH Trade Reg. Transfer Binder 1961-1963, ¶ 15,180 (1961).

permitted functional service compensation so long as such compensation was reasonable, applied only to goods on which the function was performed and involved no subterfuge. *Doubleday & Co.*, 52 F.T.C. 169 (1956).

The Order Compels Discrimination

By requiring a single net price, the Commission's order in this case compels discrimination against jobbers performing the added function. As pointed out by Mr. Justice Frankfurter in a different, but nonetheless pertinent, factual situation: "The Procrustean bed is not a symbol of equality. It is not less inequality to have equality among unequals."[3] The Attorney General's National Committee to Study the Antitrust Laws, in 1955, expressed the same view in the Robinson-Patman context, pointing out that denial of compensation to customers for functions rendered "compels affirmative discrimination against a substantial class of competitors." Atty. Gen. Nat'l. Comm. Antitrust Rep., 207 (1955), quoted in Judge Swygert's dissent. (App. A, p. 9a)

All three jobber witnesses presented by the Commission in this case sought the 10% stocking differential *without performing the stocking function.* They did not want to stock. The Commission's cease and desist order is apparently intended to force petitioner to pay the 10% differential, as desired by its three witnesses, on drop shipments which petitioner itself delivers to the end users.

The order to cease and desist prohibits selling at different "net prices" to customers competing in fact. Deducting 25% on a shipment to the jobber's warehouse produces a

[3] Dissenting in *New York* v. *United States*, 331 U.S. 284, 353 (1947).

different net price than deducting 15% on a drop shipment. To be sure, the defense of cost justification pursuant to Section 2(a) may be said theoretically to be available under this order. However, this is meaningless as to functional discounts because the Commission has always held that cost justification under Section 2(a) must be related to the *seller's* differences in the cost of manufacture, sale or delivery. Commission Counsel argued in this case that:

> . . . [O]nly the seller's cost, not the buyer's, may be shown defensively under the law." (Brief on Appeal from Examiner's Decision, p. 6)

Section 2(a) Tests Are Meaningless

The Commission's cost justification criteria under Section 2(a) are impossible to apply to compensation for functional services rendered by customers. The stocking jobber is, in effect, selling a special service to the manufacturer. There is no necessary relationship between the jobber's costs of handling goods shipped to him and the manufacturer's cost savings on shipments to such a jobber. To attempt to relate the legality of such compensation to the seller's cost savings would be an exercise in frustration. It would also contradict F.T.C. precedents for service compensation under Section 2(d), where it has held that compensation for services *must* be reasonably tailored to the *customer's* costs of furnishing such services.

In all comparable transactions (drop shipments), limit and regular jobbers received precisely the same discount. Only where the added functions involved in possession occurred was the 10% greater compensation allowed to stocking jobbers. Non-stocking jobbers did not have possession or the attendant investment risks and out-of-pocket costs.

Section 2(d) Criteria

The erroneous treatment of the question of the 2(d) concept of availability is of particular significance because the majority of the Court considered this purported violation of Section 2(d) to be, perforce, a violation of Section 2(a). The majority said:

> . . . In its opinion the Commission also found that petitioner discriminated in the selection of stocking jobbers. (App. A, p. 2a)
>
> . . . § 2(a) was violated by price discrimination in that the "functional discount" was not available to all other jobbers or customers of petitioner as required by § 2(d) . . . . (App. A, p. 4a)

The Hearing Examiner, in finding No. 14 (App. C, p. 33a), had found:

> No arbitrary limitation is maintained by respondent on the number of limit [stocking] jobbers. On the contrary, any reputable dealer who has a satisfactory credit rating can become a limit jobber, provided he is willing to maintain a reasonably adequate inventory of the items in question. Not infrequently respondent's regular jobbers change their status to that of limit jobbers, and, conversely, limit jobbers sometimes prefer to discontinue the maintenance of an inventory and become regular jobbers. Of respondent's total sales of all products, less than 2 per cent are to regular jobbers.

The Commission set this finding aside on the basis of a single "illustrative" instance in 1956, involving temporary denial of stocking status to a jobber with a poor credit rating. This temporary denial loses any adverse probative character when evaluated in the light of the fact that this jobber, Western Supply Company, had no interest in per-

forming the stocking function; it wanted, rather, 25% on drop shipments. It *was* approved as a stocking jobber in 1957 and during the subsequent three year period covered by the evidence in this record did not once elect to exercise the stocking "privilege" at the 25% discount which the Commission claims is so significant to this case. The invoice evidence upon which the Commission relies relates to 1958, during which time stocking jobber status is shown to have been available to this particular jobber. (JA 349-350)

The Commission subpoenaed a list of all of petitioner's regular jobbers and could not locate one regular jobber anywhere in the United States who wanted to be a stocking jobber and was denied the opportunity.

Throughout the proceedings, petitioner was wholly denied the benefit of Commission interpretations holding that it is permissible to compensate competing distributors at different rates of compensation, per unit of product sold, for the performance of different functional services which are of unequal cost or value. The landmark case is *Lever Brothers Co.*, 50 F.T.C. 494 (1953). At p. 512 the Commission said:

> The law does not prohibit a seller from paying for services of various types. *In some cases it might be his duty to do so in order to meet the test of availability.* Nor does the law require a seller to pay at the same rate, per unit of product sold, for types of services which are of unequal cost or value .... Payments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered. (Italics supplied)

Accord, *Giant Food, Inc.*, F.T.C. Dkt. 6459, CCH Trade Reg. Transfer Binder, 1961-1963, ¶ 15,180 (1961).

See also, *F.T.C. Guides for Allowances and Services*, 1 CCH Trade Reg. Rep., ¶ 3980 (1960), relating to Sections 2(d) and 2(e).

For the jobbers who do not want to stock at 25%, the available alternative is the 15% drop shipment discount. Petitioner's dual compensation for services of unequal cost or value is certainly permissible and probably mandatory under Section 2(d).

Substantiality of the Evidence

The question of substantiality of the evidence is directly involved in these issues and in the proceedings generally. The straightforward findings of the trial examiner on many important matters of fact were peremptorily set aside by the Commission without so much as a citation to the record (see Question No. 5, p. 3 above). Whether or not an administrative agency should be permitted to ignore the findings of fact made by the Hearing Examiner and substitute opposite findings of its own without showing good cause and justification in the record is a matter of grave concern to the administrative and judicial process. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496-7 (1951).

The conclusion of the Commission's Hearing Examiner that there was "a failure of proof as to competitive injury, either actual or potential" was one of the most significant findings set aside by the Commission. Where a differential is consumed in rendering the service, there is no capacity to injure competitors. No instance of price undercutting or diversion of trade from an "unfavored" regular jobber is shown in the record. Nor is any instance shown where "unfavored" regular jobbers were unable to sell petitioner's products at the list price.

The Court of Appeals majority was also misled by the manner in which the Commission discussed "tagged" shipments. These are significant because they are the only sales considered discriminatory by the Court below. The Court erred in stating:

> . . . [T]he record contains "a large number" of invoices showing that stocking jobbers received the added discount on goods which they purchased after receiving orders from their own customers. On those "tagged" orders, there is no showing *that the stocking jobbers did any more than regular jobbers,* who received a discount of only 15%. (App. A, p. 5a) (Italics supplied)

The Commission did not say this. The Commission stated:

> This merchandise, although received by the jobber *at its warehouse*, has been shipped directly to the jobber's customer without having been "actually warehoused" or stocked. (App. B, pp. 24a-25a) (Italics supplied)

The record shows that the "tag" merely identifies certain products as being earmarked or held in reserve by a stocking jobber for a specific municipality. (JA 234) The majority of the Court confounded "tagged" shipments with drop shipments which are delivered by petitioner to the end user. Tagged products are not "shipped directly to the jobber's customer" by the *manufacturer*. All tagged shipments move to the warehouse of the jobber and are *delivered by the jobber*, without exception. Petitioner's criterion for application of the added 10% discount is shipment to the jobber. To compensate according to time and actual costs for each of thousands of items is impossible.

The Order Is Defective

The Commission's order to cease and desist is arbitrary in its application to gas products. As the Court pointed out. "The evidentiary basis of the Commission's findings and conclusions is limited to sales of petitioner's waterworks products." (App. A, p. 5a) There is no evidence of discrimination in price or injury as to gas products. End users and channels of trade for gas products differ from

those of water products. For the most part they are not sold through jobbers. (App. C, p. 29a)

It is an elementary principle that "... there must be some relation between the facts found and the breadth of the order." *Swanee Paper Corp.* v. *F.T.C.*, 291 F. 2d 833, 837 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962). See also *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941). There being no evidence of sale of gas products to competitors and there being no evidence of discrimination or injury as to gas products, there is no basis for their inclusion in a cease and desist order subject to substantial penalties.

Finally, as a result of the refusal of the Commission and the majority of the Court of Appeals to recognize or reconcile the conflict between Section 2(d) and the Commission's order herein, or to establish criteria of legality to be applied to functional service discounts assuming that they are properly subject to Section 2(a) instead of Section 2(d), petitioner finds itself subject to a vague and legally incomprehensible order to cease and desist.

As the order was entered by the Federal Trade Commission, it flatly and unequivocally required petitioner to charge all competing customers identical net prices. The majority of the Court of Appeals, on the basis of representation made by the Commission's General Counsel, without modifying the order stated that petitioner's 10% stocking discount would be lawful if granted "in a fair and legal manner"—apparently meaning, in compliance with the requirements of Section 2(d). Yet the Commission's General Counsel, in its Answer to the Petition for Rehearing, stated:

> ... [T]he Commission did not reach the question of whether compliance with Section 2(d) would be a defense to a charge of violation of Section 2(a); it held

only that compliance with Section 2(d) had not been proved. (Resp. Ans. to Pet. for Reh., p. 4)

Thereupon, in denying rehearing, the Court added a final touch which insures confusion by removing from its opinion the bracketed language in the following excerpt:

> ... The Commission order cannot do away with statutory defenses [, such as that in section 2(d),] provided by the Robinson-Patman Act ... (App. A-2, p. 15a)

What does the order mean? Frankly, petitioner does not know, and does not believe anyone else knows. The administrative and appellate proceedings have resulted in an order which flagrantly violates the standards set forth for Robinson-Patman orders in *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962). In that case, involving an order entered under Section 2(c) of the Act, the Court said at page 367-368:

> The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. (citations omitted)

The source of the confusion in the instant case is traceable to the failure of the majority of the Court of Appeals to come to grips with *either* of two basic issues in this case. These are: First, whether discounts granted to customers as compensation for performing essential warehousing and delivery services for suppliers are to be tested under Section 2(a) or under Section 2(d); and second, if subject to 2(a), what are the criteria of legality?

What are petitioner's alternatives? Assume that petitioner grants only a single discount of 15% to all jobbers. Under such a system there would be no incentive for any jobbers to maintain warehouse stocks of needed items. Any jobber which invested its money and warehousing space

in a stock of Mueller products would clearly be at a competitive disadvantage with jobbers which did *not* maintain an inventory; both would receive the same discount, yet one would have much greater overhead than the other. Under these circumstances, it would be naive to expect a stocking jobber to maintain an inventory.

Alternatively, assume that petitioner establishes a single flat 25% discount to stocking jobbers and requires that all shipments be made to their warehouses. This step prohibits petitioner from selling at a smaller discount to non-stocking jobbers, and regular jobbers are forthwith eliminated from the market. These are the very persons the Commission claims to protect. This would also be utterly wasteful. Most of petitioner's bulky products are more economically drop shipped directly to the end users.

This is the manufacturer's dilemma. The only legally safe way in which petitioner can comply with this order is to cease the use of independent distributors and to resume its own field warehousing operations, an uneconomic practice abandoned years ago.

CONCLUSION

Judge Swygert ably and objectively stated petitioner's case. As pointed out in his dissent:

> Labels should yield to realities. When a buyer performs a distribution function which similar buyers do not perform, he should be allowed to receive reasonable and commensurate compensation for the additional function. (App. A, p. 9a)

Wright Patman, the co-sponsor of the Robinson-Patman Act, has discussed the importance of the type of services involved in this case:

> ... Considerable cost is usually involved in the maintenance of warehouse facilities, besides the risk of

market depreciation and obsolescence. These functions, plus storage, handling of goods and orders, and individual shipments are important services which must be rendered in distribution; together they represent a considerable element of cost which is inescapable, and which someone must pay. Patman, *The Robinson-Patman Act*, 166 (1938).

For the first time in the 28-year life of the Robinson-Patman amendment, the Commission has here applied Section 2(a) in a way that will inevitably cause abandonment of compensatory discounts for field stocking—and for products required in the field for emergency use to insure uninterrupted distribution of water.

The question herein also affects all non-integrated segments of American industry, where distribution is effectuated through independent middlemen. A definition of the requirements of the law and the relationship between Sections 2(a) and 2(d) is necessary to remove the confusion and uncertainty which the Commission has here created.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

CORRECTED.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 13674 SEPTEMBER TERM, 1962 APRIL SESSION, 1963

MUELLER CO.,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of an Order to Cease and Desist.

September 6, 1963

Before KNOCH, KILEY, and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a petition pursuant to 15 U.S.C. § 21 to review a cease and desist order of the Federal Trade Commission for violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[1]

[1] § 2(a) of the Clayton Act, 15 U. S. C. § 13(a) provides, in pertinent part, as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

Petitioner manufactures and sells, in interstate commerce, valves, fittings and other equipment parts and accessories used especially in public and privately owned water and gas distribution systems. It has plants in Illinois, California and Tennessee. In 1957, its gross sales exceeded $25,000,000, with 40% in gas products and 60% in waterworks products. It sells directly, or through jobbers, to end users of its products. Virtually all of its gas system products and about half of its waterworks products are sold directly to ultimate users. The remainder of the waterworks system products petitioner sells to two classes of jobbers throughout the United States, respectively called "limit" or "stocking" jobbers, and "regular" jobbers. Both classes of jobbers receive a 15% discount on all orders for direct or "drop shipments" to end users. But petitioner gives a 25% discount to stocking jobbers on petitioner's products which they warehouse [2]

The Commission's complaint charges that the 10% discount differential was unlawful price discrimination. The Hearing Examiner ordered the complaint dismissed. The Commission on appeal vacated the Examiner's order and entered the order at bar. This proceeding followed.

The Commission found, among other things, that the discount to stocking jobbers competing with regular jobbers was discrimination in prices, the effect of which "may be substantially to injure, destroy or prevent competition;" that petitioner had failed to establish either that the discount to stocking jobbers was granted for the purpose of meeting in good faith low prices of competitors or that the greater discount to stocking jobbers was "cost justified." In its opinion the Commission also found that petitioner discriminated in the selection of stocking jobbers.

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[2] Smaller and commonly used parts, often to meet emergencies.

At the outset, we see no merit in petitioner's contention that the Commission "arbitrarily" overturned the findings of the Hearing Examiner and that the findings of the Hearing Examiner are supported by a "preponderance of the record evidence." The only question for us on the evidence is whether there is a substantial evidentiary basis for the findings of the Commission.

Petitioner contends the Commission produced no evidentiary basis for its finding that there was competitive injury. We point out that the Commission's finding is that the effect of the discrimination *may be* to injure.

There is evidence that the profit margin for a wholesaler in the business is "very, very low" and an additional 10% margin "extremely important;" that a retailer seeing one competitor's lower price on one item will think "you are out of line" on other items and this has a harmful effect on the regular jobbers; that a regular jobber changed to a different seller to get a discount equalling the competition of stocking jobbers; and that some of petitioner's jobbers wrote complaining of the discount to stocking jobbers. Moreover, there is apparent from the difference in discounts themselves a "reasonable possibility" that the regular jobbers would be adversely affected by petitioner's discounting practice.

We think there is a substantial evidentiary basis to support the finding that the effect of discrimination in discounts "*may be* substantially to injure competition." That is a sufficient finding. *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 46, 50 (1948),[3] *E. Edelmann & Com-*

[3] "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 50 (1948).

pany v. *Federal Trade Comm.*, 239 F. 2d 152, 154 (7th Cir. 1957), *cert. denied*, 355 U. S. 941 (1958).

We turn now to the finding that petitioner failed to establish the § 2(d)[4] "defense" interposed to the § 2(a) complaint. The Hearing Examiner found in effect that the "stocking jobber" status was available to regular jobbers. Before the Commission, in support of that finding, petitioner argued that regular jobbers were free to enter the stocking jobber status and that therefore the practice conformed to § 2(d) of the Act. The Commission found to the contrary and petitioner challenges the finding in this court.

There were no objective standards to guide regular jobbers in qualifying as acceptable and there is substantial evidence to support the Commission's finding as well as evidence that petitioner's decisions on this point were influenced by whether it had already adequate distribution "in that particular area" and by its concern to protect "old established jobbers." Theoretically, these discounts were available to all, but functionally they were not. *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 42 (1948).

Because we think the Commission's finding is based on substantial evidence, it follows that it was warranted in concluding that § 2(a) was violated by price discrimination in that the "functional discount" was not available to all other jobbers or customers of petitioner as required by § 2(d). Petitioner's position before the Commission and

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[4] § 2(d) of the Act, 15 U. S. C. § 13(d), provides as follows:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, *unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.* (Emphasis added.)

here was that to prove unlawful discrimination under § 2 (a) the General Counsel was required to prove *unavailability* of the higher discount to the regular jobbers.

Petitioner alleged, in these proceedings, and had the burden of proving, the defense set forth in § 2(a) of the Act: "* * * nothing herein contained shall prevent differentials [in price] which make only due allowance for differences in the cost of manufacture, sale, or delivery * * *." The Commission found that petitioner failed to establish that defense of "cost justification." We think there is substantial evidence in the record as a whole to support that finding.

The discount is allegedly given to cover the cost of maintaining an inventory of petitioner's products. But the record contains "a large number" of invoices showing that stocking jobbers received the added discount on goods which they purchased after having received orders from their own customers. On those "tagged" orders, there is no showing that the stocking jobbers did any more than regular jobbers, who received a discount of only 15%. Petitioner's brief in this court argues that the cost on those orders "may actually be greater because of the special handling involved." The mere possibility of greater cost is not sufficient.

The evidentiary basis of the Commission's findings and conclusions is limited to sales of petitioner's waterworks products. For this reason petitioner contends the Commission's order[5] is too broad in including its gas products. If the Commission's conclusion that petitioner violated § 2(a)

[5] The Commission order reads, in pertinent part, as follows:

It is Ordered that respondent * * * cease and desist from: Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser competing in fact with such unfavored purchaser in the resale and distribution of such products.

in distributing its waterworks products is right, it is not unreasonable for the Commission to frame its order to prohibit petitioner's use of the illegal practice in conjunction with the sale of any and all products." *Niresk Industries, Inc.* v. *Federal Trade Comm.*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied*, 364 U. S. 883 (1960). We think the evidence as to the unlawful discount justified the order to cease and desist from using the discount device on any of its products. *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 50, 52 (1948), *E. Edelmann & Company* v. *Federal Trade Comm.*, 239 F. 2d 152, 156 (7th Cir. 1957).

Petitioner argues that the Commission's order will disrupt its distribution system and prevent it and others from providing price discounts to stocking jobbers in payment for valuable warehousing functions. The Commission's order is based on findings: that the amount of discount was not cost justified; that stocking jobbers have received stocking discounts where no warehousing function was provided; and that stocking jobber status was not available to all on objective standards. The Commission's order, although written in broad terms, is based on and is limited by those findings of fact. The Commission order cannot do away with statutory defenses, provided by the Robinson-Patman Act. The Commission, in its brief, referring to the practice of compensating jobbers who perform a warehousing function, states: "* * * this is a perfectly proper procedure, provided it be done in a fair and legal manner." We approve the order on that basis.

For the reasons given, we hold the findings of the Commission are supported by substantial evidence in the record; that the Commission did not err in its conclusion of law that petitioner's conduct violated § 2(a) of the Clayton Act as amended; and that the order is valid. We have considered the other points argued, but need not discuss them.

The petition is denied. The order is AFFIRMED.

SWYGERT, *Circuit Judge*, dissenting.

The hearing examiner found that the additional ten per cent discount granted stocking (limit) jobbers compensates them for maintaining an inventory of Mueller items which are needed by users most frequently, often to meet emergencies; and that this differential in price is no greater than is necessary to reimburse these jobbers for performing a warehousing function. In other words, he found that the price difference is a functional discount representing a reasonable payment for services and facilities actually performed.

While the Commission disputed some of the examiner's findings on these issues, it is my opinion that the Commission failed entirely in its obligation to clearly show, by citation to the record or otherwise, that the examiner's findings were in error. See *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 494 (1951). A reading of the record convinces me that the Commission would have experienced great difficulty in so showing.

The important question, however, is legal rather than factual. This is because the Commission, assuming that the examiner may have been correct on the facts, concludes as a matter of law that Section 2(a) of the Robinson-Patman Act has been violated.

In finding a violation, the Commission rejected the view it espoused in *Doubleday & Co.*, 52 F. T. C. 169 (1955):

> In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller

to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it. (at 209.)

The Commission, I believe, should have adhered to that view rather than to have repudiated it.

According to the Commission's present view, legal recognition cannot be given to the fact that a customer integrates a warehousing function with his selling function and is compensated for so doing by a lower purchase price. The Commission maintains that only the selling characteristics of the customer, i.e., whether wholesaler or retailer, should be considered when setting prices.

This view is contrary to that expressed in *Doubleday* wherein it was recognized that a purchaser from a producer may perform dual distribution functions which may entitle him to be classified, economically and legally, in a category of buyers different from that which perform only a single function.

Labels should yield to realities. When a buyer performs a distribution function which similar buyers do not perform, he should be allowed to receive reasonable and commensurate compensation for the additional function. In my opinion, the reasons stated in the Report of the Attorney General's National Committee to Study the Antitrust Laws, 207 (1955), for allowing so-called functional discounts are persuasive and ought be adopted in deciding this case. That Report reads in pertinent part:

> [T]o relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing. It compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers, are unaffected by whether he also performs the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge. The value of the service is pocketed by the seller who did not earn it. Such a rule proclaims as a matter of law that the integrated wholesaler-retailer cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

The General Counsel argues that the Commission recognized that the "limit" jobbers perform warehousing and stocking services which the "regular" jobbers do not perform. It is said for the Commission, however, that if Mueller is to compensate the limit jobbers for these services, it "must follow the terms and conditions specified in Section 2(d),"[1]

The answer to this argument is that a violation of Section 2(d) is not charged. The Commission apparently recognized from the start that this is not a true Section 2(d) situation and that arguably there may be justification for a difference in discounts between the limit and the regular jobbers. Its election to prosecute a Section 2(a) charge precludes the maintenance of a Section 2(d) charge and conviction which the Commission and its counsel have added (or substituted) by way of hypothesis.

This is an added reason why I am unable to join in the majority opinion which reads into the order (but without directing its modification) the Section 2(d) proviso.

I am aware that the Robinson-Patman Act does not expressly recognize that certain buyers in a class may be additionally compensated for performing extra distribution

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[1] The General Counsel's brief reads in part:

> Petitioner's sole response to the Commission's finding that the price discriminations "subsidize" the "limit" jobbers' warehousing of certain products, and so give them a competitive advantage, is that "[i]t is ludicrous to suggest that an independent wholesaler will assume the extra burden and cost" of warehousing petitioner's products "without extra compensation." * * * This, however, is not what the Commission is insisting upon. The Commission concedes that this is a perfectly proper procedure, provided it be done in a fair and legal manner. In this connection, the Commission observes * * *, in the words of its *General Foods* decision, that:
>
> > The law permits the seller to pay for services or facilities furnished in the resale of goods. If he elects to do so, however, the payments must be in accordance with the terms and conditions laid down in Section 2(d). To hold that the rendering of special services ipso facto gives him a separate functional classification would be to read Section 2(d) out of the Act. [52 F. T. C. at 825.] (at 53).

functions which normally would be performed by the seller. But neither does it prevent such compensation through a discount in purchasing price which discount reflects a reasonable relationship to the services performed and the facilities furnished the seller, absent any hint of subterfuge. *Doubleday, supra.* It seems to me that a realistic approach to the marketing situation presented in this case justifies an interpretation of the Act so as to allow jobbers reasonable compensation, by way of an added discount, for performing a distribution function with which Mueller had heretofore been burdened.

I would set aside the Commission's order.

APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MUELLER CO., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.		No. 13,674

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Mueller Co., a corporation, petitioner herein, having filed in this Court on March 21, 1962, a petition to review and set aside an order to cease and desist issued against it on January 12, 1962, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Mueller Co., a corporation, Docket 7514"; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in

this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on May 29, 1963; and this Court having rendered its decision on September 6, 1963; and this Court having on October 21, 1963, denied petitioner's petition for rehearing and for rehearing *en banc*, and having modified its opinion filed September 6, 1963, in certain respects;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

By the Court:

/s/ Win G. Knoch
Win G. Knoch
United States Circuit Judge.

/s/ Roger J. Kiley
Roger J. Kiley
United States Circuit Judge.

.....
Luther M. Swygert
United States Circuit Judge.

Entered: November 19, 1963

APPENDIX A-2

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, October 21, 1963

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

MUELLER CO., Petitioner, vs. No. 13674 FEDERAL TRADE COMMISSION, Respondent.	Petition for Review of an order of the Federal Trade Commission.

IT IS ORDERED by the Court sitting *en banc* that the petition of Mueller Co. for rehearing *en banc* be, and the same is hereby DENIED.

(Judges Schnackenberg and Swygert voted to grant the petition).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, October 21, 1963

Before

Hon. WIN C. KNOCH, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

MUELLER CO., Petitioner, vs. No. 13674 FEDERAL TRADE COMMISSION, Respondent.	Petition for Review of an order of the Federal Trade Commission.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby DENIED.

IT IS FURTHER ORDERED by the Court that the opinion of this Court filed herein on September 6, 1963, be modified in the following respects:

On page 3 of the slip opinion, in the second line of the second full paragraph, put the word "defense" in quotation marks, and insert the word "interposed" after "defense".

On page 4, in the first full paragraph, add the following sentence as the concluding sentence: "Petitioner's position before the Commission and here was that to prove unlawful discrimination under § 2(a) the General Counsel was required to prove *unavailability* of the

higher discount to the regular jobbers, and before the Examiner petitioner introduced evidence of availability in an attempt to establish a § 2(d) defense".

On page 5, in the seventh line from the bottom of the full paragraph in the middle of the page, eliminate the following: "such as that in § 2(d),".

(Judge Swygert voted to grant the petition).

APPENDIX B

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Andersen
William C. Kern
Philip Elman
Everette MacIntyre

In the Matter of
Mueller Co., a corporation. } Docket No. 7514

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (The Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., Sec. 13), the Federal Trade Commission on June 10, 1959, issued and subsequently served upon the respondent named in the caption hereof its complaint in this

proceeding, charging said respondent with having violated subsection (a) of Section 2 of said Clayton Act, as amended. The respondent's answer to the complaint was filed on August 24, 1959. Hearings were thereafter held before a duly designated hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed March 10, 1961, the hearing examiner found that the charge had not been sustained by the evidence and ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision and the entire record in this proceeding and having determined that the appeal should be granted and that the initial decision should be vacated and set aside, now makes this
243* its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

Findings as to the Facts.

1. Respondent, Mueller Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 512 West Cerro Gordo Street, Decatur, Illinois.

2. Respondent is engaged in the business of manufacturing, distributing and selling water and gas distribution service products throughout the United States. These products include a complete line of valves, fittings,

* Marginal paper number hereinafter refer to pages of the record filed in the Court of Appeals (Ed. footnote).

tools and machines and related items and parts and accessories therefor which are specially designed and particularly suitable for use in municipal and industrial gas and water plants. Respondent's business is substantial, with gross sales in excess of $25,000,000 for the year 1957.

3. Respondent owns, maintains and operates manufacturing plants in the States of Illinois, California, and Tennessee, from which it sells and distributes gas distribution and service products of like grade and quality to purchasers located throughout the various States of the United States and other places under the jurisdiction of the United States.

4. In the course and conduct of its business, respondent has been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

5. Respondent sells a substantial portion of its products to jobbers who resell such products to privately owned companies and municipalities for use in constructing and operating water and gas distribution systems. These jobbers are classified by respondent into two categories, one category being known as "limit" jobbers and the other as "regular" jobbers. On all purchases made for drop shipment of ultimate users, jobbers in both cate-
244 gories are granted the same discount from prices in respondent's published price lists. The same discount also applies to many items shipped direct to the jobber regardless of its classification. However, there are a number of items, accounting for about 40% of all sales of waterworks products, on which the discount is 25% when shipped to "limit" jobbers and 15% when shipped to "regular" jobbers. These items are for the most part products most frequently needed by the ultimate users, often to meet emergencies.

6. Products sold by respondent to "limit" jobbers at 25% discount are ordinarily stocked by such jobbers and respondent claims that the price differential between products purchased for shipment to the jobber and products drop shipped to the ultimate user is to compensate the jobber for performing this stocking or warehouse function. In some instances, however, "limit" jobbers have received the 25% discount on the purchase of products which were not actually stocked by them.

7. The aforesaid products have been sold by respondent at 25% discount from list prices to "limit" jobbers who were in fact competing with "regular" jobbers who purchased said products from said respondent at 15% discount from the same list prices. The effect of these price discriminations may be substantially to injure, destroy or prevent competition with jobbers receiving the higher discount.

8. Respondent claims that it granted the higher discounts to "limit" jobbers for the purpose of meeting in good faith equally low prices of competitors and further claims that its lower prices to "limit" jobbers were cost justified. It has failed to establish either of these defenses on the record, however.

9. On the basis of the record herein, the Commission finds that respondent has discriminated in price between different purchasers in the sale of certain of its products in commerce and that the effect of such discriminations may be substantially to injure, destroy or prevent competition with purchasers receiving the benefit of such discriminations.

Conclusions.

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respond-
245 ent. The aforesaid acts and practices of respondent, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended.

Order.

It Is Ordered that respondent, Mueller Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its water and gas distribution and service products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser competing in fact with such unfavored purchaser in the resale and distribution of such products.

It Is Further Ordered that respondent, Mueller Co., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission.

/s/ Joseph W. Shea,
Secretary.

Issued: January 12, 1962.

246 BEFORE FEDERAL TRADE COMMISSION.

Docket No. 7514

Commissioners:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

OPINION OF THE COMMISSION.

By Kern, Commissioner:

Respondent herein is charged with price discrimination in violation of Section 2(a) of the Clayton Act, as amended. The hearing examiner in his initial decision held that the charge had not been sustained by the evidence and ordered that the complaint be dismissed. The matter is now before the Commission on the appeal of counsel supporting the complaint from this decision.

Respondent is engaged in the manufacture and sale of products used by privately owned companies and municipalities in constructing and operating water and gas distribution systems. Virtually all of the gas distribution products are sold by respondent directly to the ultimate users. The waterworks products, accounting for about 60% of respondent's business, are sold by respondent to the ultimate users and to jobbers who resell to such users.

The jobbers to whom respondent sells its products are classified by respondent as "limit" and "regular" jobbers. On all purchases made for drop shipment to ultimate users, jobbers in both categories are granted the same discount from prices in respondent's published price lists. The 247 same discount also applies to many items shipped direct to the jobber, regardless of its classification. However, there are a number of items, accounting for about 40% of all sales of waterworks products, on which the discount is 25% when shipped to the "limit" jobber and 15% when shipped to the "regular" jobber. It is this difference in discounts which has given rise to the present charge of illegal price discrimination.

The first point raised on the appeal of counsel supporting the complaint concerns the failure of the hearing examiner to include in the initial decision a finding that

respondent had discriminated in price between different purchasers in sales made in interstate commerce. We agree that the initial decision is deficient in this respect. The record fully supports a finding that "limit" and "regular" jobbers located in Kansas and Missouri were charged different prices for goods of like grade and quality sold to them from respondent's place of business in Decatur, Illinois. These price differences are price discriminations within the meaning of Section 2(a). *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960).

Counsel supporting the complaint has also taken exception to the hearing examiner's conclusion that no injury would result from the price discriminations involved herein and contends that certain findings on which this conclusion is based are neither accurate nor pertinent to the issue of whether respondent's price differential may have the requisite effect on competition. He further contends that the hearing examiner erred in his application of certain "principles" enunciated in the Commission's opinion in the matter of *Doubleday & Company, Inc.*, 52 F. T. C., 169 (1955), to the facts of this case.

The hearing examiner found, in this connection, that the "limit" jobber maintains an adequate inventory of the items on which it receives a 25% discount, whereas the "regular" jobber maintains little or no inventory, making almost all of its purchases for drop shipment. He further found that the added 10% discount received by the "limit" jobber is a functional discount granted as compensation for the services performed by this jobber in maintaining an adequate inventory of certain items, a function 248 which would otherwise be performed by respondent, and that such discount is no greater than necessary to reimburse the jobber for performing this function. He concluded that the evidence as to competitive injury to the

"regular" jobber "probably would be sufficient in the ordinary secondary line price discrimination case" and that "a difference in discounts of 10 percent is so substantial that it would appear that ordinarily, in a secondary line case, no specific evidence of competitive injury would be required." He held, however, that this is not an ordinary case in that the higher discount received by the "limit" jobber is a functional discount and that a determination of the legality thereof would be governed by the Commission's decision in *Doubleday, supra.* Relying on this decision, the hearing examiner further held that since the higher discount is granted only on the purchase of certain goods actually warehoused by the "limit" jobber and since the cost of such service equals or exceeds the difference in discounts, there is no reasonable probability of substantial injury to respondent's "regular" jobbers.

The language in *Doubleday*, which the hearing examiner considered to be controlling, is as follows:

> "In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule,

incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly per-
249 from the wholesaling function; it forbids the matter to be put to proof.

> "On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it."

Although the initial decision is not quite clear on this point, it appears that the hearing examiner interpreted the above quoted language as either holding that a price differential granted as compensation for services performed by a purchaser for the seller will not result in injury to competition or as holding that a price differential granted for this purpose is permissible regardless of injury to competition. There is nothing in the amended Clayton Act or in the applicable case law, however, to support either of these propositions. The latter interpretation would add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b). The other interpretation, that injury will not result from a functional discount "reasonably related to the expenses assumed by the buyer," ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. Consequently, we disagree with both interpretations and, insofar as the language is *Doubleday* stands for either of them, it is rejected. We might add in this connection that the views expressed in *Doubleday* with respect

to functional pricing were, in effect, overruled by the Commission in a later decision. In the matter of *General Foods Corporation*, 52 F. T. C. 798 (1956), the Commission stated:

> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in
250 effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result. * * *
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> * * * The law permits the seller to pay for services or facilities furnished in the resale of goods. If he elects to do so, however, the payments must be in accordance with the terms and conditions laid down in Section 2(d). To hold that the rendering of special services ipso facto gives him a separate functional classification would be to read Section 2(d) out of the Act."

We are also of the opinion that the hearing examiner erred in holding that there was a failure of proof as to competitive injury. It appears that he based this conclusion on "the fact that respondent's limit jobbers receive the higher discount only on certain goods actually warehoused by them, and the further fact that the cost of such service equals or exceeds the difference in discounts." We do not agree that these "facts" are supported by the record or that, even if true, they would support the hearing examiner's conclusion.

The record discloses with respect to the first finding that in some instances "limit" jobbers have received the 25%

discount on goods which they purchased from respondent after having first received orders for such goods from their own customers. This merchandise, although received by the jobber at its warehouse, has been shipped directly to the jobber's customer without having been "actually warehoused" or stocked. As to the second "fact" found by the hearing examiner, we think the evidence adduced by respondent concerning the cost of warehousing its products is inconclusive. Some of the testimony on this point is contradictory. Moreover, all of the witnesses called by respondent testified as to the over-all cost of doing
251 business on all products which they warehouse, not as to the cost of warehousing respondent's products. And there is testimony that warehousing costs vary from item to item.

As stated above, however, even if these findings were correct that would not support the conclusion that respondent's price discriminations do not have the proscribed effect on competition. These findings mean only that respondent has subsidized in whole or in part the "limit" jobbers' warehousing of certain products. This much, at least, it has done. By doing so, respondent has given this class of customers a substantial competitive advantage in the resale of such products. In this connection, the items on which the higher discount is given are, as found by the hearing examiner, the smaller, most commonly used products—those which are needed most frequently by the ultimate user, often to meet an emergency. That a jobber who has products of this type on hand is in a more favorable position than the jobber who does not is so obvious as to require little comment. Respondent, however, points up this advantage in its brief. In an attempt to distinguish the facts of this case from

those of Morton Salt,[1] it states that in the sale of waterworks products "service is as important as the product". It then comments as follows: "In Morton Salt both favored and unfavored classes of purchasers carried the salt in stock. Obviously, when a housewife wants a package of salt she is going to buy it from stock or not at all; and if a merchant told a housewife that he was going to have the salt drop shipped from a factory in Chicago, he would be considered non compos mentis." We think that this reasoning applies with at least equal force to a situation where service is important and where the product is frequently needed to meet an emergency.

The hearing examiner has also made certain findings concerning the availability of the higher discount granted by respondent which suggest that each of respondent's customers had the choice of being a "limit" jobber and receive this discount or of being a "regular" jobber and receive the lower discount. The record discloses, however, that this is not the case. Respondent, and respondent alone, decides whether "limit" jobber status will be conferred on a customer. In making this decision, respondent 252 takes into consideration such factors as the customer's credit rating, its location, and its ability to properly represent respondent and to maintain an adequate inventory of respondent's products. It is only when the customer is acceptable to respondent that respondent will grant it "limit" jobber status. And the record shows that some of respondent's "regular" jobbers were not acceptable. As illustrative of this point, the following letter was received by one of respondent's "regular" jobbers who had asked respondent to give it the "limit" jobber discount.

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[1] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

"In your letter dated March 6 you refer to the 15% discount mentioning that you feel you are entitled to 25% because you plan to stock several items which should qualify you as a stocking distributor.

"We cannot see our way clear to change your 15% discount, for we do not have a 20% discount. We do have a greater one, however it applies only to those large stocking jobbers who place hundreds of orders with us throughout the year, totaling thousands of dollars.

"These old established jobbers, who have been carrying Mueller goods in large quantities for a number of years, are entitled to this protection, and until there might be some major change in your State and surrounding states, it will be necessary to continue the same differential that we have been allowing you."

For the foregoing reasons, it is our opinion that, in many instances, the 25% "limit" jobber discount was not available to jobbers classified by respondent as "regular" jobbers.

In the brief filed in answer to the present appeal, respondent argues in effect that its practice of compensating customers for furnishing certain services and facilities complies with the requirements of Section 2(d) of the
253 amended Clayton Act and consequently should not be held to be in violation of Section 2(a). We are not impressed with this contention for respondent's practice would not have been in compliance with Section 2(d) if this section were applicable. The added 10% discount granted "limit" jobbers, if regarded as an allowance for services furnished by said jobbers in connection with the processing, handling, sale or offering for sale of certain products, was not made available on proportionally equal

terms to all other customers competing in the distribution of such products. As stated above, the discount for performing these services was not made available to the "regular" jobbers, nor was a discount or "allowance" for performing alternative services offered or made available to them.

From our consideration of the entire record, it is concluded that respondent has discriminated in price between different purchasers in the sale of certain of its products in commerce and that the effect of such discriminations may be substantially to injure, destroy or prevent competition with purchasers receiving the benefit of such discriminations. The appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is vacated and set aside, and we are issuing our own findings, conclusions and order to cease and desist in lieu thereof.

January 12, 1962.

APPENDIX C

150 BEFORE FEDERAL TRADE COMMISSION.
Docket No. 7514

INITIAL DECISION.

By William L. Pack, Hearing Examiner.

James R. Fruchterman, for the Commission.

Bell, Boyd, Marshall & Lloyd, Chicago, Illinois, by John T. Loughlin; and

Webber, Webber & Welsh, Decatur, Illinois, by A. G. Webber, III, for the Respondent.

1. The respondent, Mueller Co., is charged with price discrimination in violation of Section 2 (a) of the Clayton

Act, as amended by the Robinson-Patman Act. Hearings have been held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by the parties, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. Respondent, an Illinois corporation, has its main office and principal plant in Decatur, Illinois. It is engaged in the manufacture and sale of water and gas distribution and service products, the products being used
151 by municipalities and private companies engaged in constructing and operating water and gas distribution systems. The products are of almost unlimited variety, ranging from small valves and fittings to large and expensive machines and appliances. Respondent is one of the largest and best known producers in the industry.

3. Respondent sells its products both direct to the ultimate users—municipalities and private companies operating gas and water works systems—and to jobbers, who resell to such users. Water products account for some 60 percent of respondent's business, gas products some 40 percent. Practically all of the gas products are sold direct to users. Sales of water products are divided about equally as between sales direct to users and sales to jobbers. The evidence in the present proceeding relates almost entirely to water products.

4. The case arises out of the fact that respondent maintains two categories of jobbers, and on certain items grants to jobbers in one category a larger discount from list prices than is granted jobbers in the other category. The two categories are "limit jobbers" and "regular jobbers". In the case of regular jobbers, most of their purchases are

drop shipped by respondent to the ultimate user, that is the municipality or privately owned utility. And limit jobbers have many of their purchases drop shipped to the ultimate user. On all drop shipments jobbers in both categories receive exactly the same discount. And on numerous items shipped to the jobbers direct the discount is the same, regardless of the category in which the jobber may fall.

5. There are, however, a number of items shipped to the jobbers direct on which the discount is 25 percent to limit jobbers, 15 percent to regular jobbers. These items for the most part consist of the smaller, most commonly used products—those which are needed most frequently by the ultimate user, often to meet an emergency.

6. The reason for the difference in discounts is that the limit jobber maintains an adequate inventory of such items and can supply them to the user immediately upon request. The regular jobber, on the other hand, maintains little or no inventory and can supply the needs of the user only by special order to respondent or to a limit 152 jobber. The added 10 percent discount is a functional discount granted the limit jobber as compensation for the services performed by him in maintaining an adequate inventory of the items in question. The discount is not allowed on any other items, whether carried in stock or not.

7. Warehouses for the purpose of stocking the items in question were formerly maintained by respondent in several principal cities throughout the country. It was found, however, that the expense of maintaining the warehouses was too great and they were discontinued. In their stead, respondent adopted its present plan of allowing an extra 10 percent discount to jobbers who are willing to perform the warehousing function. The plan appears not to

have been originated by respondent; it was already in use by others in the industry. Jobbers who perform the warehousing function are frequently referred to in the industry as "stocking jobbers", and the accompanying discount is known as a "stocking discount".

8. The increased discount of 10 percent is no greater than is necessary to reimburse respondent's limit jobbers for the function they perform. The undisputed evidence is that it costs at least 10 percent, and probably more, to maintain an inventory of goods such as are here involved and supply them to users when needed.

9. The evidence as to existence of competition between the limit jobbers and regular jobbers is not strong, but probably is sufficient. And the evidence as to competitive injury to the regular jobbers probably would be sufficient in the ordinary secondary line price discrimination case. In fact, a difference in discounts of 10 percent is so substantial that it would appear that ordinarily, in a secondary line case, no specific evidence of competitive injury would be required.

10. But this is not an ordinary case. Rather, it is a case in which purchasers receiving the larger discount perform a very definite, substantial and valuable function which otherwise would have to be performed by the seller. And the increased discount is no greater than is necessary to compensate the purchaser for the services rendered.

11. The leading Commission case on functional discount appears to be that of Doubleday and Company, Inc. (1955), Docket No. 5897, 52 F.T.C. 169, in which the Commission, at page 209, said:

153 "In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and effi-

ciency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

"On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it."

12. The facts in the present case seem clearly to bring it within the principles announced in the Doubleday case.

13. It also seems clear that there is a failure of proof as to competitive injury, either actual or potential, in view of the fact that respondent's limit jobbers receive the higher discount only on certain goods actually warehoused by them, and the further fact that the cost of such service equals or exceeds the difference in discounts. In these cir-

cumstances it is difficult to see how there can be any substantial injury to the regular jobbers.

14. No arbitrary limitation is maintained by respondent on the number of limit jobbers. On the contrary, any reputable dealer who has a satisfactory credit rating
154 can become a limit jobber, provided he is willing to maintain a reasonably adequate inventory of the items in question. Not infrequently respondent's regular jobbers change their status to that of limit jobbers, and, conversely, limit jobbers sometimes prefer to discontinue the maintenance of an inventory and become regular jobbers. Of respondent's total sales of all products, less than 2 percent are to regular jobbers.

15. In summary it is concluded that the higher discount granted by respondent on certain of its sales to limit jobbers is a functional discount representing no more than reasonable compensation for services and facilities actually supplied by such jobbers; that in the circumstances here present there is no substantial competitive injury, nor any reasonable probability thereof, to respondent's regular jobbers; and that therefore no violation of the statute has been established.

Order.

It Is Ordered that the complaint be, and it hereby is, dismissed.

William L. Pack,

Hearing Examiner.

March 10, 1961.